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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 260

CITY OF NEW BRUNSWICK, a Municipal Corporation, WILLIAM G. HOWELL, Treasurer of the City of New Brunswick, and WILLIAM G. HOWELL, Tax Collector of the City of New Brunswick,

Petitioners,

against

UNITED STATES OF AMERICA and UNITED STATES HOUSING CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JOHN W. DAVIS,
THOMAS H. HAGERTY,
RUSSELL E. WATSON,
EDWARD L. PATTERSON,
Attorneys for Petitioners.

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IN THE

District Court of the United States

OCTOBER TERM, 1926.

CITY OF NEW BRUNSWICK, a Municipal Corporation, WILLIAM G. HOWELL, Treasurer of the City of New Brunswick, and WILLIAM G. HOWELL, Tax Collector of the City of New Brunswick,
Petitioners,

against

UNITED STATES OF AMERICA and UNITED STATES HOUSING CORPORATION,
Respondents.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners above named, the City of New Brunswick and William G. Howell, as Treasurer and as Tax Collector of said city, respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Third Circuit, recorded and filed March 15, 1927, in the suit hereinafter mentioned entitled United State of America, et al., Appellants, vs. City of New Brunswick, et al., Appellees.

Statement of the Case.

The City of New Brunswick is a municipal corporation of the State of New Jersey, and William G. Howell is and was at the date of the decree sought to be reviewed the Treasurer and Tax Collector thereof.

The United States Housing Corporation is a corporation organized under the Business Corporations Law of the State of New York, being Chapter 6 of the General Laws of said State, having its principal office in the Borough of Manhattan, City and State of New York. Said corporation was organized July 8, 1918, by direction of the President, pursuant to the authority conferred upon him by Act of Congress approved June 4, 1918 (40 Stat. 594, 595) amending the Act of Congress approved May 16, 1918 (40 Stat. 550).

The purposes for which said corporation was formed are thus stated in its certificate of incorporation (Rec., p. 50):

> "* * * * to purchase, acquire by lease, construct, or acquire in any manner, houses, buildings, furnishings, improvements, local transportation and other general community utilities and parts thereof; to purchase, lease, or acquire in any manner any improved or unimproved land, or any right, title or interest therein, on which such houses, buildings, improvements, local transportation and other general community utilities and parts thereof have been or may be constructed; to equip, manage, maintain, alter, rent, lease, exchange, sell and convey such lands, or any right, title, or interest therein, houses, buildings, improvements, local transportation and other general community utilities, parts thereof and equipment; to aid in providing, equipping, managing and maintaining houses, buildings, improvements, local transportation and other general community utilities, by loan or otherwise; * * *"

All of the stock issued by said corporation was subscribed for and is held and voted by the Secretary of Labor, as Trustee for the United States, the said Secretary having been designated by the President for that purpose (Rec., pp. 43-44).

Said United States Housing Corporation, on or about September 10, 1918, acquired by purchase for the purposes of its organization a tract of land in the City of New Brunswick, New Jersey, containing approximately forty-two acres, caused the same to be divided into blocks and lots, according to a map thereof, and commenced the erection of 192 houses

to provide housing and general community facilities for employees of the United States and industrial workers engaged or to be engaged at New Brunswick in industries connected with the war in which the United States was then engaged. Such tract is known and is sometimes hereinafter and in the accompanying brief referred to as the "Lincoln Gardens" property. The said construction was in progress on November 11, 1918, when the Armistice terminating hostilities was concluded. The United States Housing Corporation proceeded with the completion of said houses, laid out and constructed the streets and avenues shown on its map, installed sewers, sidewalks, curbs, gutters, gas and electric lighting, the cost of all of which was paid from funds appropriated by the Congress of the United States (Rec., pp. 44-45).

In addition to the utilities installed by the United States Housing Corporation, the City of New Brunswick, at its own expense, installed a sanitary outlet sewer and water mains, and paved an avenue adjacent to the property at a total cost of $27,013.80 (Rec., p. 45).

By Act of Congress approved July 11, 1919 (41 Stat. 35, 55), United states Housing Corporation was directed to cover into the Treasury the unexpended balance of the appropriations made for the purpose of carrying out the provisions of the aforesaid Act of May 16, 1918 (40 Stat. 550).

The Appropriation Bill approved July 19, 1919, (41 Stat. 163) contained the following (p. 224):

> "Section 5 of the Act entitled 'An Act to authorize the President to provide housing for war needs,' approved May 16, 1918, is hereby amended to read as follows:
>
> 'Sec. 5. That the power and authority granted herein shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such property as remains undisposed of; * * *. *All property shall be sold at its fair market value as soon as can be advantageously done,* and a reasonable effort shall be

made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. *All deeds, contracts or other instruments of conveyance* executed by the United States Housing Corporation by its duly authorized officer or officers where the legal title to the property in question is in the name of said corporation, and by the United States of America by the Secretary of Labor where the title to the property in question is in the name of the United States of America, *shall be conclusive evidence of the transfer of title to the property in question according to the purport of such deeds, contracts*, or other instruments of conveyance, and in no case shall any purchaser or grantee thereunder be required to see to the application of any purchase money: *Provided, however*, That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: * * * The United States Housing Corporation (a corporation organized by authority of the President of the United States, pursuant to the provisions of an Act approved May 16, 1918, entitled 'An Act to authorize the President to provide housing for war needs,' and an Act approved June 4, 1918, entitled 'An Act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, on account of war expenses, and for other purposes) shall wind up its affairs and dissolve as soon as it has disposed of said property and performed the duties and obligations herein set forth * * *." (Italics petitioner's.)

Pursuant to the direction and authority of the last mentioned Act above quoted, the United States Housing Corporation proceeded to sell and dispose of said lands and premises in the City of New Brunswick acquired by it, including the 192 houses above mentioned and the lots appurtenant to them. Said sales were made under a uniform form of contract prepared by the United States Housing Corporation, the form of which will be found in the Record at pages 15-18,

and also at pages 53-56. All of the said premises were so sold between the dates October 29, 1919, and October 24, 1920 (Rec., p. 48). The said contracts provided in each case that when the purchaser had paid a stipulated sum in cash, usually 10% (Rec., p. 47), the said corporation should execute and deliver to him a special warranty deed, free from all encumbrances except as in said contract mentioned, such purchaser to execute and deliver to the corporation a note secured by a purchase money mortgage for the balance of the purchase price (Rec., pp. 54-55). It was further provided in said contracts that all taxes should be apportioned and adjusted as of the date of contract, and that in case a purchaser failed to pay any taxes so apportioned to him, the seller corporation might pay the same, the amount thereof to be added to the purchase price, and the purchaser should be charged with interest thereon (Rec., pp. 55-56).

The various purchasers entered into possession of the premises respectively purchased by them upon the execution of their contracts. All of said purchasers (with a few exceptions) had made the cash payments which under the terms of their contracts entitled them to their deeds prior to October 1, 1920. All of them had so become entitled to deeds by October 1, 1921. (Record, Exhibit "D" pp. 57-61).

Since 1920, or prior thereto, the City of New Brunswick, in addition to the utilities above mentioned has provided the said tract with police and fire protection, has regularly removed ashes and garbage therefrom, has accorded educational facilities for the children of the residents in its public schools, and has furnished free transportation for said children to and from school (Rec., pp. 25-32). The cost to the City of the last two items for the years 1920 to 1923, both inclusive, was $43,886.90 (Rec., p. 26). The City of New Brunswick assessed the said tract to United States Housing Corporation, as owner, for taxation for the year 1918 in the sum of $100.10, and for the year 1919 in the sum of $257.48. The said taxes not having been paid, a sale of the lands was conducted ac-

cording to the provisions of the Statutes of the State of New Jersey on September 29, 1920, upon which the said premises were struck off and sold to the City. On October 8, 1920, certificates of sale therefor were delivered to the City and thereafter recorded (Rec., pp. 45-46). Upon the trial of the suit hereinafter mentioned, however, it was admitted by counsel for the City that the said assessments and taxes for 1918 and 1919 were invalid (Rec., p. 23), and the decree of the District Court directs that the said assessments be struck from the assessment books and the certificates of sale cancelled (Rec., pp. 70-71). The City did not appeal from this provision of the decree, and no question therefore is now presented as to the taxes for those years.

For the year 1920 and subsequent years to and including 1923, the said premises were assessed for taxation by the City of New Brunswick to the purchasers of the several parcels respectively, upon the theory that inasmuch as such purchasers had in each case fully performed (so far as lay in their power) the conditions and stipulations of their contracts entitling them to receive deeds under the terms of said contracts, they had become in equity the owners thereof, and that the United States Housing Corporation merely held the legal title as Trustee for such purchasers (Rec., pp. 14-15, 32).

Said purchasers having failed to pay the said taxes so assessed, the said lands were advertised for sale on September 26, 1922, for delinquent taxes assessed for 1920, 1921 and 1922, but said sale has been restrained by order of the United States District Court for the District of New Jersey, and has never taken place. (Rec., p. 49).

The United States Housing Corporation, although admitting that the several purchasers are entitled to deeds under their contracts, has refused to execute and deliver such deeds upon the ground that the assessments for taxation above mentioned and sales for non-payment thereof constitute encumbrances upon the property which, if allowed to stand, may be

prior to the lien of the Housing Corporation and of the United States for the unpaid balance of the purchase money (Rec., p. 48).

Suit was accordingly brought in October, 1922, by the United States Housing Corporation against the petitioners herein in the United States District Court for the District of New Jersey to compel the striking from the assessment books of the assessments of said property for taxation and for a permanent injunction against the sale of the said property for the collection of taxes assessed. By amendment, the United States of America was joined as a complainant in said suit. The District Court held that the equitable title had passed to the purchasers under the terms of their contracts in such wise as to subject the property to taxation as the property of such purchasers for 1920 and subsequent years (Memorandum Opinion, Rec., pp. 62-68) and a final decree was made by said Court January 13, 1925, vacating the assessments for 1918-1919 against United States Housing Corporation, directing the cancellation of the certificates of sale based thereon, and sustaining the assessments for 1921, 1922 and 1923, except as to certain parcels not here involved (Rec., pp. 69-74). From this decree the complainants appealed to the Circuit Court of Appeals for the Third Circuit, which reversed it in so far as it sustained the validity of any of the assessments upon the grounds stated in its opinion (Rec., pp. 78-83). A decree upon said decision was recorded and filed March 15, 1927 (Rec., pp. 84-88), which among other things declared the property in controversy exempt from all taxes theretofore assessed against it and perpetually enjoined the petitioners from taking any action to enforce or collect any taxes assessed against it for the years 1918 to 1927, both inclusive, and from assessing, levying or collecting any taxes against it "so long as the title thereto and the ownership thereof shall be vested in the complainants, the United States of America and the United States Housing Corporation" (Rec., p. 87).

The opinion of the District Court is reported in 1 Fed. (2nd) 741, and appears at pages 62-68 of the Record. The opinion of the Circuit Court of Appeals is reported in 11 Fed. (2nd) 476, and appears at pages 79-83 of the Record.

This writ is sought to review the said decision and decree of the said Circuit Court of Appeals.

Jurisdiction of the Court.

This Court has jurisdiction of the original cause under Judicial Code, Section 24 (1) (U. S. C., Sec. 41), it being a suit of a civil nature arising under the laws of the United States, involving the sum of $3,000.

This application is made under Judicial Code, Section 240 (a) (U. S. C., Sec. 347).

Questions Presented.

I. Did the equitable title pass to the several purchasers when the contracts were executed, or at latest when said purchasers had made the cash payments which, under the terms of their said contracts, entitled them to receive warranty deeds conveying the legal title?

II. If the equitable title so passed, did the United States nevertheless retain such an interest in the property as to preclude its taxation under State laws?

III. If, notwithstanding the terms of sale as set forth in the contracts, and the passing of an equitable title to the purchasers, the lien of the United States for the unpaid balance of the purchase money remained superior to that of any taxes which might be assessed under state laws, did that fact preclude the taxation by state authority of the interest of the purchasers in the property, whatever that might be?

IV. Did the Circuit Court of Appeals err in enjoining petitioners from enforcing collection of the taxes for 1920 and subsequent years in any manner whatsoever, and from

assessing, levying or collecting any further taxes against any of the said property?

Reasons for the Application.

The reasons for the presentation of this petition are that the Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority, and has decided an important question of federal law which either has not been, but should be, settled by this Court, or has been decided by said Circuit Court of Appeals in a way probably in conflict with applicable decisions of this Court, cited in the accompanying brief.

The case involves a question of great importance to the City of New Brunswick and its taxpayers. The City has incurred, is incurring and will necessarily continue to incur great expense in providing the property in question with the police, fire, educational and other municipal benefits enjoyed by the other residents of the City, the funds for which must necessarily be raised by taxation. If as contended by the United States, and apparently held by the Circuit Court of Appeals, the City is powerless to tax the property or the purchasers' interests therein until the last cent of the sales price has been paid, the purchasers will obtain until that time all these benefits at the expense of the other taxpayers of the City. The injustice and hardship of such a condition of things is obvious.

WHEREFORE your petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit, and submit their brief hereto attached in support of this petition.

Respectfully submitted,

JOHN W. DAVIS,
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EDWARD L. PATTERSON,
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BRIEF IN SUPPORT.

Summary.

POINT I.

UPON PAYMENT BY THE PURCHASERS UNDER THE SEVERAL CONTRACTS OF THE STIPULATED CASH PAYMENTS, SUCH PURCHASERS UNDER THE TERMS OF THEIR CONTRACTS BECAME ENTITLED TO RECEIVE DEEDS. THE EQUITABLE TITLE WAS VESTED IN THEM, AND UNITED STATES HOUSING CORPORATION MERELY HELD THE LEGAL TITLE AS TRUSTEE FOR THEM. SUCH EQUITABLE TITLE IN THE PURCHASERS WAS SUBJECT TO ALL THE USUAL INCIDENTS OF ABSOLUTE OWNERSHIP, INCLUDING LIABILITY FOR STATE AND LOCAL TAXATION.

POINT II.

ASSUMING THAT NOTWITHSTANDING SUCH PERFORMANCE OF THEIR CONTRACTS BY THE PURCHASERS AS ENTITLED THEM TO DEEDS UNDER THE TERMS THEREOF, THE UNITED STATES STILL RETAINED SUCH AN INTEREST IN THE PROPERTY AS WAS EXEMPT FROM TAXATION UNDER STATE LAWS, IT WAS NEVERTHELESS WITHIN THE POWER OF THE STATE OF NEW JERSEY TO PROVIDE FOR THE TAXATION OF THE PURCHASERS' INTEREST IN THE PROPERTY, WHATEVER THAT MIGHT BE. IF THE UNITED STATES HAD A LIEN PRIOR TO ALL OTHER LIENS, IT WAS NOT CONCERNED WITH THE MANNER IN WHICH SUCH PURCHASERS' INTEREST WAS SOUGHT TO BE TAXED, NOR WITH ANY QUESTIONS OF LEGALITY OR IRREGULARITY IN CONNECTION THEREWITH. IT WAS, THEREFORE, ERROR TO ENJOIN THE ENFORCEMENT OF THE ASSESSMENTS IN THE NAMES OF THE PURCHASERS, AND THE FUTURE ASSESSMENT OF THE PROPERTY.

Either the Acts of Congress under the authority of which United States Housing Corporation acted in selling the Lincoln Gardens property sanctioned its sale under the form of contract employed for the purpose, or they did not. In the former case, the property became subject to taxation under state authority when the contracts were delivered, or at latest when the purchasers became entitled to receive their deeds. In the latter event, the lien of the United States still remains paramount to that of all state and local taxes, and the Government is in no way prejudiced by or concerned with anything that may be done with a view to taxing the interest of the purchasers subject to that lien. Under either alternative, it has no standing to demand the cancellation of the assessments in question or the sweeping prohibition of any proceedings whatever to enforce them against any persons under any circumstances, which is embraced in the decree of the Circuit Court of Appeals.

POINT I.

Upon payment by the purchasers under the several contracts of the stipulated cash payments, such purchasers under the terms of their contracts became entitled to receive deeds. The equitable title was vested in them, and United States Housing Corporation merely held the legal title as trustee for them. Such equitable title in the purchasers was subject to all the usual incidents of absolute ownership, including liability for state and local taxation.

No equitable principal is better established than that equity looks upon that as done which ought to be done. The application of this maxim to a contract for the sale of real estate is that when a valid contract of sale has been entered into, equity regards the purchaser as the owner and the vendor as a mere trustee of the naked legal title for him.

The purchaser's interest in the realty descends to his heirs, and is subject to dower. This doctrine is so elementary that it seems scarcely necessary to cite authorities.

Carroll v. *Safford,* 3 How. 441, 461;
Green v. *Smith,* 1 Atkyns, 572;
Farrar v. *Earl of Winterton,* 5 Beav. 1, 8;
Bispham, Principles of Equity (7th Ed.), Sec. 364, p. 534;
Pomeroy, Equity Jurisprudence (3rd Ed.), Secs. 105, 368, 372, 1406.

It has been frequently laid down by the New Jersey Court of Chancery:

Hoagland v. *Latourette,* 2 N. J. Eq. 254;
Huffman v. *Hummer,* 17 id. 264, 266-7;

King v. *Ruckman*, 21 id. 599, 604;
Haughwout v. *Murphy*, 22 id. 531, 546.

Its application is, of course, emphasized when, as in the instant case, the contract of sale explicitly provides that the purchaser shall be entitled to a deed conveying the legal title, upon certain conditions, which he has performed or is willing to perform.

This principle has been repeatedly applied by this Court in cases involving alienation of the public lands and other property of the Federal Government.

Carroll v. *Safford*, 3 How. 441;
Witherspoon v. *Duncan*, 4 Wall. 210;
Tucker v. *Ferguson*, 22 Wall. 527;
Union Pacific Railroad Co. v. *McShane*, 22 Wall. 444;
Baltimore Shipbuilding Co. v. *Baltimore*, 195 U. S. 375;
Bothwell v. *Bingham County*, 237 U. S. 642;
Irwin v. *Wright*, 258 U. S. 219.

The congressional purpose in acquiring and disposing of the Lincoln Gardens property must be kept in mind. Its acquisition was occasioned solely by an extraordinary emergency, the war with the Central European powers. That emergency having passed with the signing of the Armistice on November 11, 1918, the United States had no further use for the property, and Congress wisely determined to dispose of it as speedily as might be in order that the public funds invested in it might be used for other governmental purposes. It therefore directed its sale "as soon as can be advantageously done" (Act of July 19, 1919, 41 Stat. 163, 224).

The enactment last cited provides that all deeds, *contracts* or other instruments of conveyance executed by the United States Housing Corporation where the legal title is in the name of that corporation shall be considered *conclusive evi-*

dence of the *transfer of title.* No directions, restrictions or conditions as to the terms upon which any such property shall be sold appear in the Act beyond the proviso that no sale or conveyance on credit shall be made without reserving a first lien on the property for the unpaid purchase money. This necessarily implies the right to sell on credit.

The stumbling block upon which the Federal authorities appear to have tripped in the instant litigation seems to be the construction to be given to the words "first lien". The construction contended for is apparently that the United States is to have a first lien at all times until all the purchase money has been paid, and not merely a first lien at the time of the sale or conveyance. Petitioners maintain that this contention is without merit.

It is well settled that words and expressions in a Statute are to be interpreted in their common and ordinary sense unless the contrary clearly appears.

U. S. v. *Isham,* 17 Wall. 496, 504;
U. S. v. *Fidelity Trust Co.,* 222 U. S. 158, 160.

"First Lien" in its common, ordinary sense when used in relation to real estate transactions means a first lien at the time when a conveyance is made or a mortgage taken. It does not mean a lien which shall subsequently remain paramount to all others. A familiar case is that of a purchase money mortgage which is a first lien on the real estate when taken (provided that the property is then clear of taxes), but over which recurrent taxes and assessments imposed by legal authority take precedence as they are assessed from time to time. Recurrent taxes are a universally present incident of the ownership of real estate.

Baltimore Shipbuilding Co. v. *Baltimore,* 195 U. S., 375, 381;
Tucker v. *Ferguson,* 22 Wall. 527, 573.

It is manifest that Congress, in directing the disposition of the holdings of the Housing Corporation, authorizing, as it did, sales upon credit, must have contemplated the universal incident of ordinary taxation; otherwise, unquestionably, it would not have given the Housing Corporation a free hand as to the terms upon which it might sell, but would have provided against the situation which has here arisen by appropriate restrictions.

There is ample precedent for Congressional permission to tax property owned by the United States or in which they have an interest.

The Act of August 11, 1876 (19 Stat. 127), providing for the sale of certain ceded Indian Lands in Kansas, provided for the payment of the purchase price in instalments. Section 7 of the Act, however, provided that nothing therein contained should prevent the land from being taxed as were other lands of the State from and after the first payment.

Under various Acts of Congress, the latest of which is that of June 23, 1836, (5 Stat. 52, Sec. 13, p. 55), certain surplus moneys of the United States were entrusted to the State of New York for safekeeping. By direction of the Legislature of that State (Chap. 150 of the Laws of 1837, and subsequent Acts), these moneys have habitually been loaned on bonds secured by mortgages on real estate. So far as can be ascertained, the claim has never been advanced that these mortgages had any priority of lien over taxes on real estate covered by them, or stood upon any different footing in this respect from any other real estate mortgages.

The Federal Farm Loan Act (Act of July 17, 1916, 39 Stat. 360) authorizes the Government of the United States to subscribe for and hold without restriction as to amount the stock of Federal Land Banks (Sec. 5, p. 364), and makes all such banks depositaries of public money (Sec. 6, p. 365). Sections 12 and 13 authorize the investment of such funds as may be in the possession of such banks in loans on duly recorded first mortgages on farm lands and in the purchase

of such mortgages. Section 26 (p. 380) exempts such banks from all taxation, federal, state, municipal and local, but expressly excepts from this exemption taxes upon real estate held, purchased or taken by any such bank for transaction of its business (Sec. 11, p. 370), or acquired in satisfaction of debts, or purchased at sales under judgments, decrees or mortgages held by it (Sec. 13, p. 372).

Another familiar instance is the permission given by R. S. §5219 to tax the real estate of National Banking Associations, which are Federal agencies, and can only be taxed under leave of the Federal Government. *McCulloch* v. *Maryland,* 4 Wheat., 316.

It seems clear, therefore, that if Congress had intended to prohibit sales by the Housing Corporation upon such terms of credit as might render the property sold subject to state and local taxation in the hands of the purchaser, if in the judgment of the officers of the Corporation it seemed advisable to sell upon such terms, it would have said so in unmistakable language.

The form of contract under which the sales in the instant case were made shows beyond a doubt that the construction of the Act contended for by the petitioners was that understood and adopted by the Department of Labor and by the Housing Corporation (Rec., pp. 53-56). This form is headed, "United States Department of Labor, Bureau of Industrial Housing and Transportation, United States Housing Corporation." It recites that the agreement is made by the United States Housing Corporation, acting by authority of the President of the United States and the Secretary of Labor, and also as the duly authorized agent of the United States of America. It provides that when the purchaser has paid a specified sum in cash, the Housing Corporation will execute and deliver to him a good and sufficient special warranty deed, free from all encumbrances except as may be mentioned in the contract, the purchaser to execute and deliver to said seller a note or notes secured by a purchase money mortgage

or trust deed for the balance of the purchase money. It further provides that all taxes and assessments shall be apportioned and adjusted between the parties *as of the date of the contract,* that all general taxes and special assessments thereafter becoming due shall be paid by the purchaser, and that if the latter shall fail to pay any such taxes or assessments, and the seller shall pay them, such payments shall become additional consideration for the sale and immediately become due and payable by the purchaser.

The understanding and intent of the parties could not have been more clearly expressed than by the form of contract adopted.

In the Court below, a number of decisions of this and other courts were cited by the Government and relied upon to support the proposition that as long as the latter retains any financial interest in land which it has contracted to sell, or which is subject to entry or preemption under any Act of Congress, or if any act remains to be performed by the purchaser or entryman, the equitable title does not vest in the latter so as to subject the property to taxation under State laws. It is submitted that all of these cases are readily distinguishable from the instant case.

In *Wisconsin Central Railroad Company* v. *Price County,* 133 U. S., 496, certain acts specifically prescribed by the Statute involved (Act of May 5, 1864, 13 Stat. 66, Sec. 3), had not been performed when the taxes were assessed.

In *Railway Co.* v. *Prescott,* 16 Wall., 603, the Statute (Act of July 1, 1862, 12 Stat. 489, as amended by Act of July 2, 1864, Sec. 21, 13 Stat. 356, 365) provided that before conveyance the cost of surveying, selecting and conveying the lands should be paid, which had not been done.

In *Railway Co.* v. *McShane,* 22 Wall. 444, which arose under the same statutes, the same rule was applied as to lands where the patents had not been actually issued.

Colorado Company v. *Commissioners, etc.,* 95 U. S. 259, arose under Act of July 1, 1870, 16 Stat., Ch. 202, Private

Acts, p. 44. Section 3 of this Act expressly provided that confirmation of title should not become effective until certain specified payments had been made. These payments had not been made. The Court said, however (p. 265):

> "If the tax had been levied on the equitable claim of these holders * * * *whatever that is*, the case might be different." (Italics Petitioners').

Northern Pacific R. R. Co. v. *Traill County*, 115 U. S., 600, presented a situation similar to that in *Railway Co.* v. *Prescott* and *Railway Co.* v. *McShane*, *supra*. The Statute (Act of July 2, 1864, 13 Stat., 365, as amended by Act of July 15, 1870, 16 Stat. 291, 305-6), specifically provided that the lands granted should not be conveyed until the cost of surveying, etc., had been paid, which had not been done. ....

In *Hussman* v. *Durham*, 165 U. S., 144, arising under Act of March 3, 1855, 10 Stat. 701, it appeared that the original land warrant had been cancelled under authority of Act of June 23, 1860, 12 Stat., 90, and no payment for the land had ever been made by the original locator. It was accordingly held that both the legal and equitable title were in the United States when the land was assessed and sold for taxes.

In *Irwin* v. *Wright*, 258 U. S., 219, it was held that the equitable title had not passed because certain specific requirements of the Reclamation Act had not been complied with.

In *State* v. *Itasca Lumber Co.*, 100 Minn. 355, 111 N. W. 276, it appears from the opinion that the assessment of the lands involved was made before the Commissioner of the Land Office had approved the application for their location, and that until such approval no title, legal or equitable, vested in the applicant as against the United States.

Cott v. *State of West Virginia*, 69 W. Va., 439; 71 S. E., 580; 35 L. R. A. (N. S.) 669; *U. S.* vs. *Milwaukee*, 100 Fed. 828 and *Mint Realty Co.* v. *City of Philadelphia*, 218 Pa., 104, 66 Atl., 1130, were all cases where the contract of sale

provided in terms that the deed was to be delivered only when the purchase price was fully paid.

In all of these cases the Court considered that the Government retained the legal title as security for payment of the purchase money, or performance of some other conditions precedent to alienation.

As pointed out above, the instant case differs from all of them in that the contract of sale provides for the divesting of the Government's legal title when a part only of the purchase price has been paid, and that the purchasers shall give notes and mortgages for the balance. The provision for the giving of the mortgages necessarily looks to the surrender of not only the equitable but the legal title when the stipulated cash payment has been made. Furthermore, the tax clause evidently contemplates that the property will be subject to taxes under State authority, not only from the time when the purchaser becomes entitled to the deed, but from the date of the contract. Counsel for the Government argued below that the clauses relating to apportionment of taxes were inserted in these contracts because they were entered into prior to the decision of this Court in *Clallam County* v. *U. S.*, 263 U. S., 341, holding that land held in the name of a corporation organized under State laws under Congressional authority merely as an instrumentality of the United States for carrying on the war was to all intents and purposes property of the United States and was subject to the same rules, so far as local taxation was concerned. It is true that that case was not decided until 1923, and the contracts were made in 1919 and 1920; but the record shows that the City began to assess the property against the contract holders in 1920, and has done so in every succeeding year. A possible uncertainty in the minds of the officials of the Housing Corporation at the time it prepared its form of contract as to what might ultimately be decided as to the liability of its holdings to local taxation cannot absolve it from engagements deliberately entered into. Everyone, even the most illiterate citizen,

is conclusively presumed to know the law, however intricate. It is difficult to see why this rule does not apply to Government officials. Moreover, the case last referred to in no way supports the contention of the Government as to the assessments for any year after 1919. In that case, the County authorities undertook to assess the real estate involved while it stood in the name of the United States Spruce Corporation (precisely as the City of New Brunswick assessed the Lincoln Gardens property in the instant case to the Housing Corporation for 1918 and 1919), there being no question of the Spruce Corporation having parted with its equitable title to a third party.

As stated in the Petition (p. 6), Petitioners concede the invalidity of the assessments for those years.

Of course the purchasers have not executed the notes and purchase money mortgages which the contracts provide they shall do upon receiving their deeds. No suggestion is made that they have ever been asked to do so or that any of them has refused or expressed any unwillingness to do so. It is admitted by the stipulation (Rec., p. 48) that the Housing Corporation has refused to deliver the deeds, alleging the assessment of the properties by the City as its sole excuse.

It is submitted that it was the intention of Congress to dispose of the properties acquired by the Housing Corporation at as early a date as possible, and to that end to confer wide discretionary powers upon the latter as to the terms of sale; that the proviso of the Act requiring the reservation of a first lien was fully complied with by the clauses in the contracts that the purchasers should give purchase money mortgages for the sums not paid in cash when the deeds were to be delivered to them, and that taxes should be apportioned; that nothing in the Act required or contemplated that the United States should continue to hold any title to the property, legal or equitable, which would exempt such property from local taxation in the hands of purchasers; that the assessments to the United States Housing Corporation

for 1918 and 1919, concededly void, in no way vitiated the priority of the first lien which Congress prescribed should be retained, and that the purchasers, having performed as far as lay in their power all the conditions of their contracts necessary to entitle them to receive legal title, the assessments against them were proper, and that the Circuit Court of Appeals erred in declaring them void and enjoining collection of the taxes based upon them.

POINT II.

Assuming that notwithstanding such performance of their contracts by the purchasers as entitled them to deeds under the terms thereof, the United States still retained such an interest in the property as was exempt from taxation under State laws, it was nevertheless within the power of the State of New Jersey to provide for the taxation of the purchasers' interest in the property, whatever that might be. If the United States had a lien prior to all other liens, it was not concerned with the manner in which such purchasers' interest was sought to be taxed, nor with any questions of legality or irregularity in connection therewith. It was, therefore, error to enjoin the enforcement of the assessments in the names of the purchasers, and all future assessment of the property.

The Circuit Court of Appeals, in reversing the District Court, apparently took the ground that the Housing Corporation had exceeded the authority conferred upon it by Congress in making the contracts with the purchasers in the form in which they were made. It said (Record, p. 82):

> "We enforce the statute when we hold that there was no authority to sell this land on credit and divest the government's ownership 'without reserving a first lien on such property for the unpaid purchase money'. This could not be done until the purchaser had fully performed every provision of the contract made pursuant to the statute and the City made this impossible for him to do by assessing the taxes in question."

The petitioners contend that if this view is correct it impales the Government upon the second horn of the dilemma mentioned at the outset of this brief. Concededly the Housing Corporation could make no valid contract for the sale of any of the property except under Congressional authority. If it exceeded its powers by inserting in the contracts the clauses relating to taxes above referred to, such clauses were mere nullities. If it was the true intent of Congress that the first lien referred to in the proviso should be a lien prior not only to all existing but to all future taxes, then the assessments by the city for 1920 and subsequent years are absolutely null and void as against the United States and its agency, the Housing Corporation, and cannot affect their rights or title or embarrass them in any possible way. If such be the case, there is no ground for the equitable relief prayed for in the bill, and to which the Circuit Court has decided the complainants were entitled. The assessments are void as against the United States, and the purchase money mortgages which the Housing Corporation will receive if it performs its contracts will take precedence over the taxes. The lien of the latter, if any, attaches only to the purchasers' interests and cannot embarrass the United States in any degree. The Circuit Court of Appeals in this view of the case should not have declared the property exempt generally from all taxes, and restrained the petitioners from assessing, levying or collecting any such on account of the same, but should have contented itself with decreeing that any proceedings taken or had by the City or

its officers in this connection should be subject to the prior lien of the United States.

It is well settled that a State may tax or authorize its municipalities to tax the interest of a purchaser from the United States of any property upon which the latter has a first lien.

Baltimore Shipbuilding Co. v. *Baltimore,* 195 U. S. 375, 381;
Irwin v. *Wright,* 258 U. S. 219, 230;
Witherspoon v. *Duncan,* 4 Wall. 210, 217;
Railway Co. v. *McShane,* 22 Wall. 444, 461.

In the courts below there was discussion as to whether the laws of New Jersey permit the assessment of real estate to an equitable owner. Without in any way admitting the Government's contention on this point, it is submitted that this is no concern of the United States if, as claimed, it has a lien superior to that of all state or municipal taxes. The validity and regularity of the assessments and subsequent proceedings become merely a matter between the city and the persons against whom the taxes are assessed, in which the United States has no possible interest.

Witherspoon v. *Duncan,* 4 Wall. 210, 217.

The Court therefore erred in enjoining the petitioners from assessing the said property in so far as such assessment affected others than the United States and the Housing Corporation and from taking appropriate proceedings to enforce the taxes already assessed against the interests of the purchasers from United States Housing Corporation in the said property, whatever such interest may be.

CONCLUSION.

The Decree of the Circuit Court of Appeals places the City of New Brunswick and the general body of its taxpayers under a peculiar hardship. Its effect is that the inhabitants of a territory within the city limits more than forty acres in extent, and inhabited by at least 192 families, are to be free from all municipal taxation in respect of their real estate holdings within said territory, not only for the past eight years, but for an indefinite period in the future. Since 1919 and 1920, when substantially all of the inhabitants went into possession under their contracts, they have received police and fire protection, had their garbage and ashes collected, their children educated at the common schools and transported to and from the latter, all at the expense of the other tax payers of the city. Under the decision sought to be reviewed, this state of affairs must continue in the case of each purchaser until he has paid the last cent of the contract price of his property. There is nothing to prevent the United States Housing Corporation extending the time of payment indefinitely. If any purchasers default in their payments and it becomes necessary to default their contracts, or to foreclose mortgages on their property and find new purchasers, the period of exemption will be still further prolonged.

The existence of the assessments for 1918 and 1919 against the Housing Corporation, and the tax sales thereunder, in no way excuse its refusal to perform its contracts. These assessments and sales are concededly void, and the City has acquiesced in their cancellation. If these contracts were between private parties, no question could possibly arise of the right of the purchasers to specific performance. If it be conceded that that *remedy* is not available to them against the United States, their *rights* and liabilities incident thereto nevertheless remain unaffected.

This Court will not overlook the fact that it is the United States Government and one of its agencies which in the in-

stant case have come into a Court of Equity and asked for relief upon the mere possibility that they may some day be embarrassed in the collection of the money due them by the failure of purchasers to pay for the benefits which they are deriving from the City of New Brunswick. This is no excuse, as this Court has expressly held.

> "It would be a very harsh doctrine that would deny the right of the States to tax lands because of a mere possibility that they might lapse to the United States. The contrary is the law."
>
> *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382.

The Housing Corporation admits that it has broken its contracts with its purchasers, who, as far as appears from the record, are in no way in default, alleging as its only excuse the action of the City of New Brunswick in endeavoring to make these purchasers pay their fair share of the expenses of the municipality incurred for their benefit in common with the other inhabitants.

It is submitted that a party who comes into a court of equity as a confessed violator of his obligations is not entitled to much consideration. "He who commits inequity shall not have equity."

Francis, Max. 2, cited in *Crawford* v. *Bartholf,* 1 N. J. Eq. 458, 470.

Respectfully submitted,

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